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REDACTED – FOR PUBLIC INSPECTION

August 9, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Business Data Services in an Internet Protocol Environment,  
WC Docket No. 16-143; Special Access for Price Cap Local  
Exchange Carriers, WC Docket No. 05-25**

Dear Ms. Dortch:

Hawaiin Telcom, Inc. (“HTI”) has attached the redacted version of its reply comments filed in the above-captioned proceedings. The reply contains highly confidential information pursuant to the protective orders adopted in this proceeding,<sup>1</sup> and extended to WC Docket 16-143.<sup>2</sup>

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<sup>1</sup> See *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Modified Data Collection Protective Order, 30 FCC Rcd 10027 (WCB 2015) (“Modified Data Collection Protective Order”); *Order and Data Collection Protective Order*, 29 FCC Rcd 11657 (WCB 2014) (“Data Collection Protective Order”); *Second Protective Order*, 25 FCC Rcd 17725 (WCB 2010) (“Second Protective Order”); *Modified Protective Order*, 25 FCC Rcd 15168 (WCB 2010) (“Modified Protective Order”).

<sup>2</sup> *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, et al., DA 16-722 (WCB, rel. Jun. 24, 2016) (“Protective Order Extension”).

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Marlene H. Dortch  
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Please let me know if you have any questions.

Sincerely,

/s/ Gregory J. Vogt

Gregory J. Vogt  
Counsel for Hawaiian Telcom Inc.

Enclosure

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol	)	
Environment	)	WC Docket No. 16-143
	)	
Special Access for Price Cap Local Exchange	)	WC Docket No. 05-25
Carriers	)	

**REPLY COMMENTS OF HAWAIIAN TELCOM, INC.**

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August 9, 2016

## SUMMARY

The comments filed in this proceeding starkly demonstrate that the FCC was misguided in issuing the *BDS NPRM*. The market serving business and carrier communications needs, including business data services, is pervasively competitive. The FCC should therefore abandon the *BDS NPRM*, particularly with respect to insular and mid-size incumbent local exchange carriers (“ILECs”), because there is no evidence that the prices for their business data services are unreasonable or unlawful.

From the outset, this proceeding has focused on regulation of traditional special access services, now called business data services, provided by the largest ILEC special access providers. The pervasive competition characterizing these services does not justify any new regulation, and indeed further deregulation is warranted, for any ILEC. Just as important, competing parties, the FCC, and other government entities all fail to produce evidence of unreasonable business data service pricing by Hawaiian Telcom in Hawaii. Consideration should be given to Hawaiian Telcom, which is an insular carrier that is entitled under the law to specialized regulation.

Competition for special access services is “near ubiquitous” and “pervasive.” The data submitted in this proceeding demonstrates that, since 2010, the market for business data services has grown even more competitive in Hawaii. Large and well-heeled competitors have been providing business data services in Hawaii, which effectively polices business data services pricing on the islands. The market in Hawaii is changing rapidly, with a significant decrease in DS1 and DS3 sales, with an increase in IP-based services sales.

The Rysman paper is fatally flawed for its reliance on outdated and flawed data. The paper, and the statistics based on this record do not support the *FNPRM*’s proposals. This is true because a facilities-based carrier has facilities within one-half mile of the vast majority of large

businesses, thus making it capable of competing with the current service provider in a building, including in Hawaii. These facts should cause the Commission to proclaim victory, because its competition policies have been working.

Hawaii has a unique insular geography where most of the population centers and business are concentrated on the island of Oahu, which is the target of most competitive entry. This concentration of businesses demonstrates that there is no further reason to require a new competitive showing in order for Hawaiian Telcom to have pricing flexibility authority on the island of Oahu given that competition is already a proven market fact. Admittedly, there is less competition on some of the neighbor islands in Hawaii because populations there are scattered and smaller. Because of the low-density populations and unique climate and terrain, providing business data services on these neighbor islands entails much higher costs of providing service compared to Oahu. The fact that wireless carriers need telecommunications connections to support 5G does not change this conclusion. Although 5G services promise significant economic benefits, these services need to cover the costs they cause. In any event, wireless carriers currently enjoy pricing that is significantly below tariffed prices.

This record simply does not support re-regulation of business data services, particularly in Hawaii with its unique insular geography, terrain, and climate. Customers are benefiting from competition in Hawaii, and from the deregulated prices that exist in that market. All customers, including 5G providers, should pay the cost of providing service to their locations in order to promote investment risk-taking by the provider. The Commission should therefore abandon the proposals contained in the *BDS FNPRM*.

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**Before the  
Federal Communications Commission  
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**REPLY COMMENTS OF HAWAIIAN TELCOM, INC.**

The comments filed in this proceeding starkly demonstrate that the FCC was misguided in issuing the *BDS NPRM*.<sup>1</sup> The market serving business and carrier communications needs, including business data services, is pervasively competitive. Competitive providers are increasingly expanding their market share, including cable TV providers and competitive local exchange carriers (“CLECs”). Commission intervention in this market based on outdated and flawed data would distort a competitive marketplace, undermine investment incentives, undermine technological and market innovations, and be harmful to customers. The only beneficiary of the *NPRM* proposals would be competing carriers that do not want to risk their own money to serve the marketplace, but would rather force ILECs to provide them with below-cost services to increase their own profitability. The FCC should therefore abandon the *BDS NPRM*, particularly with respect to insular and mid-size ILECs, because there is no evidence that the prices for their business data services are unreasonable or unlawful.

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<sup>1</sup> *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al.*, Tariff Investigation Order & Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) (“*BDS FNPRM*”).

## I. INTRODUCTION.

Hawaiian Telcom, Inc. (“HTI”), as the incumbent local exchange carrier (“ILEC”) serving the State of Hawaii, provides traditional regulated special access services to business and carrier customers. HTI and its affiliate, Hawaiian Telcom Services Company, Inc. (“HTSC”), provide among other things, unregulated Ethernet and other IP-based services to Hawaii businesses and carriers. Together (collectively referred to as “Hawaiian Telcom”), these companies offer a wide spectrum of telecommunications products and services to government agencies, large corporate clients, and small- and mid-sized businesses, including wireless carriers, interexchange carriers, cable companies and CLECs. Business customers that subscribe to business data services are located primarily on the island of Oahu, where over 67 percent of Hawaii’s business customers are served.<sup>2</sup>

Hawaiian Telcom faces unique and serious competitive challenges to its provision of business data services in the State of Hawaii. Oceanic Time Warner Cable (“OTW”), now owned by Charter Communications (“Charter”), operates its own extensive and sophisticated high bandwidth network, through which it has been able to achieve a dominant position in Hawaii providing video services to approximately 72 percent of the occupied households on Oahu that subscribe to television service<sup>3</sup> and 75 percent of high speed Internet consumers.<sup>4</sup> OTW, and its nationwide business services affiliate, are also authorized as a CLEC to provide

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<sup>2</sup> Declaration of Kenneth Hensarling, Jr., ¶ 3 (attached as Appendix A) (“Hensarling Declaration”).

<sup>3</sup> Hawaiian Telcom Holdco, Inc., Securities Exchange Commission Form 10-K, 8 (fiscal year ended December 31, 2015).

<sup>4</sup> Pacific Business News, Internet Service Providers Ranked by Subscribers as of 12/31/2015, (dated April 22, 2016), *available at* <http://www.bizjournals.com/pacific/subscriber-only/2016/04/22/internet-service-providers.html> (last viewed Aug. 4, 2016).



resold and facilities-based intrastate telecommunications in the state of Hawaii. Both have not only provided tariffed business data services in direct competition with Hawaiian Telcom since 2008, but also now offer high-capacity transmissions services including Metro Ethernet. Charter in this proceeding has admitted that it “intends to continue to invest significantly in expanding its facilities-based BDS capabilities”<sup>5</sup> and that its “BDS prices have fallen over time,”<sup>6</sup> demonstrating the important competitive force that OTW exerts in Hawaii. Similarly, Charter has claimed that the broader service area of its newly-merged entities “will increase New Charter’s ability to compete for enterprise business customers, thus benefitting the Hawaii market for such services as well.”<sup>7</sup> Charter expects that its increased nationwide geographic footprint will position it to “improve competition in the business telecommunications sector, allowing New Charter better to serve enterprise customers who require service at multiple sites, including locations both in Hawaii and on the mainland.”<sup>8</sup> Clearly, the expanded technological scope and the economies of scale that the merged Charter will bring will result in even increased competitive pressure to the Hawaii market and to Hawaiian Telcom in particular, whose resources as a mid-sized independent ILEC are much more limited than those of Charter.

Level 3, now owner of the facilities-based tw telecom of hawaii, l.p., constructed a third competitive network in Hawaii serving large business and wholesale carrier customers alike. tw

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<sup>5</sup> Comments of Charter Communications, Inc., WC Docket No. 16-143, *et al.*, Exhibit A, Declaration of Phil Meeks, 5 (dated Jun. 28, 2016) (“Charter Comments”).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Joint Petition of Charter Communications, Inc., and Time Warner Cable Information Services (Hawaii), LLC and Time Warner Cable Business LLC for Approval of (1) the Transfer of Control of Time Warner Cable Information Services (Hawaii) and Time Warner Cable Business LLC, and (2) Participation in Certain Financing Arrangements, Hawaii PUC Docket No. 2015-0207, 17 (filed Jul. 15, 2015).

<sup>8</sup> *Id.*

telecom has been operating in the Hawaii market for over 15 years, and owns extensive undersea cable and terrestrial fiber facilities in the State of Hawaii. As a competitive provider with national reach, Level 3 presents the same competitive challenges as Charter. Other competitors also operate in Hawaii to serve business and carrier customers.

Notwithstanding these tough competitive circumstances, Hawaiian Telcom, as an insular carrier, faces unique circumstances that make serving its customers difficult and costly in various parts of its service territory. These factors have been fully described in other pleadings.<sup>9</sup>

## **II. NO PARTY HAS SUBMITTED EVIDENCE COMPLAINING ABOUT INSULAR MID-SIZE CARRIER BUSINESS DATA SERVICE RATES.**

From the outset, this proceeding has focused on regulation of traditional special access services, now called business data services, provided by the largest ILEC special access providers.<sup>10</sup> The pervasive competition characterizing these services does not justify any new regulation, and indeed further deregulation is warranted, for any ILEC. Just as important, competing parties, the FCC,<sup>11</sup> and other government entities all fail to produce evidence of unreasonable business data service pricing by Hawaiian Telcom in Hawaii. The Commission cavalierly rejects the notion that different ILEC business data service providers should be regulated differently, relying only on the fact that some of Hawaiian Telcom's services are

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<sup>9</sup> See, e.g., Comments of Hawaiian Telcom, Inc., WC Docket No. 10-90, 8-20 (filed Mar. 13, 2013) (“HTI Non-Contiguous Insular Comments”).

<sup>10</sup> *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005).

<sup>11</sup> Hawaiian Telcom is mentioned a mere four times in the *BDS NPRM*, with no competitive assessment whatsoever in Hawaii associated with any of the references. *BDS NPRM*, ¶¶ 24 n.37, ¶ 51 n.117, 257 n.671, 517.

common carrier services.<sup>12</sup> This is an obvious non-answer to the question raised by commenters such as Hawaiian Telcom: is there any evidence that Hawaiian Telcom's rates are unlawful?

The answer is a resounding no.

**A. There is No Evidence That Insular Mid-Size Carrier Business Data Services Prices Are Unreasonable.**

None of the commenters in this proceeding have provided any facts upon which a regulator could begin an investigation of the special access offerings of mid-size price cap carriers such as Hawaiian Telcom. Furthermore, CLECs and end users cite no evidence to purportedly justify such re-regulation in Hawaii.<sup>13</sup> Since there is no evidence that Hawaiian Telcom business data service rates are unlawful, no further regulation of them is warranted.

No other governmental authority has found Hawaiian Telcom pricing to be unlawful. For instance, the National Regulatory Research Institute ("NRRI"), which was commissioned by the National Association of Regulatory Utility Commissioners to study special access pricing and included data from non-RBOC companies, does not recommend repricing mid-size price cap carrier access rates.<sup>14</sup> The GAO Report cited by the Commission and CLECs in this proceeding also fails to recommend action that would reprice mid-size carriers' special access services.<sup>15</sup>

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<sup>12</sup> *Id.* at ¶ 257. Hawaiian Telcom Ethernet and other IP-based services are now not regulated as Title II services pursuant to forbearance authority previously granted.

<sup>13</sup> Alaska Communications, another mid-size ILEC, demonstrates the procompetitive impact special access pricing flexibility has bestowed on the business market in its operating territory. Comments of Alaska Communications, WC Docket No. 16-143, 5-13 (filed June 28, 2016).

<sup>14</sup> P. Bluhm & R. Laube, *Competitive Issues in Special Access Markets*, 95 (National Regulatory Research Institute; Jan. 21, 2009).

<sup>15</sup> Even the now widely discredited General Accountability Office Study on special access pricing did not recommend any action against mid-size carrier special access pricing. *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, GAO-07-80 (General Accountability Office, Nov. 2006) ("GAO Report").

The *BDS NPRM* proposes to adopt regulations based on aggregated nationwide data,<sup>16</sup> but the Commission itself frequently requires carriers to provide market specific data under a heightened competitive showing in order to be relieved of that regulation through a forbearance petition.<sup>17</sup> Such inconsistency is arbitrary and capricious. In the business communications market, in which the Commission's newly defined business data services are offered, the Commission has already undertaken substantial deregulation based on evidence of the growing competition in the marketplace. The Commission should only reimpose regulation, after it has previously found unnecessary, based on proof of specific market facts. The burden of proof should be on those seeking to change the current regulatory mechanisms, including on the Commission, not the carriers operating under such deregulatory rules.

**B. The Commission Has Recognized the Uniqueness of Insular Areas.**

Insular carriers serve unique service territories, which are characterized by difficult geographic, terrain, and climate conditions that increase their costs. Section 254 of the Communications Act recognizes that insular carriers should be singled out for special consideration, together with rural and high cost areas.<sup>18</sup> The Commission has specifically

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<sup>16</sup> The Commission imposed nationwide regulation on broadband Internet access services and concluded that no rate regulation would be imposed without any specific market analysis. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report & Order on Remand, Declaratory Ruling, & Order, 30 FCC Rcd 5601 (2015), *aff'd*, *U.S. Telecom Ass'n. v. FCC*, No. 15-1063 (D.C. Cir., decided Jun. 14, 2016).

<sup>17</sup> *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010), *pet. rev. den.*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

<sup>18</sup> 47 C.F.R. § 254(b)(3).

recognized these higher insular costs when it developed the cost model for determining universal service support for price cap carriers.<sup>19</sup>

First, Hawaiian Telcom serves a geographically isolated area made up of several islands with diverse climate, topography, and character. Second, Hawaii’s population is dispersed throughout the islands with the exception of a large population center in Honolulu. And, finally, Hawaiian Telcom lacks other sources of funding for network investment in rural and high cost areas. This combination of factors makes providing service to Hawaii’s historically underserved and economically challenged population particularly difficult.<sup>20</sup> The Commission should take these insular issues into account to avoid further regulation of business data services in Hawaii and other insular areas, which may result in less competition and investment in these underserved areas.

**C. There is Substantial Competition in Hawaii for Business Data Services.**

According to Compass Lexecon, based on data the Commission has collected in this proceeding, competition for special access services is “near ubiquitous” and “pervasive.”<sup>21</sup> CLECs and cable companies have deployed facilities to the overwhelming majority of census blocks and business establishments in Metropolitan Statistical Areas (“MSAs”) where Phase I

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<sup>19</sup> *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 193 (2011), *pets. for review denied*, *Direct Communs. Cedar Valley, LLC v. FCC*, 753 F.3d 1015 (10th Cir. 2014); *Connect America Fund*, WC Docket No. 10-90, *et al.*, Report and Order, 28 FCC Rcd 5301 (Wir. Comp. Bur. 2013); *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, 29 FCC Rcd 3964 (Wir. Comp. Bur. 2014) .

<sup>20</sup> These unique circumstances are more fully described in HTI Non-contiguous Insular Comments at 8-20

<sup>21</sup> Compass Lexecon, Competitive Analysis of FCC’s Special Access Data Collection, WC Docket No. 05-25, *et al.*, §§ I.B, II.C (dated Jan. 26, 2016) (filed on behalf of Alaska Communications, AT&T Inc., CenturyLink, FairPoint Communications, Frontier Communications, Hawaiian Telcom, and Verizon) (“Compass Lexecon White Paper”).

and II pricing flexibility has been granted and where businesses operate and order business data services.<sup>22</sup> This is equally true in Honolulu, Hawaii, the main center of business activity where Hawaiian Telcom provides the vast majority of business data services.<sup>23</sup>

The data submitted in this proceeding demonstrates that, since 2010, the market for business data services has grown even more competitive in Hawaii. According to the Compass Lexecon analysis, based on the information concerning DOCSIS 3.0 services shown on the National Broadband Map and the data submitted in this proceeding, virtually all businesses in Honolulu located in census blocks where there is demand for business data services are served by one or more facilities-based (i.e., non-UNE-based) competitive providers.<sup>24</sup> Even if the National Broadband Map data is excluded, the Compass Lexecon analysis of the data submitted in response to the Commission’s data request shows that there is a choice of one or more facilities-based competitive providers for the overwhelming majority of businesses located in census blocks in Honolulu where there is demand for business data services. Because these competitive providers have “sunk” costs, it is to their benefit to obtain as many customers as possible, therefore fostering a highly competitive market for business data services.

OTW, as an affiliate of nationwide Charter Communications, has attested to its intent to continue to invest heavily in the business data services marketplace. It admits that prices have been falling, which is a clear indication of competition, the exact result that the Commission seeks to promote in this proceeding.<sup>25</sup> Because the market is already working to increase

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<sup>22</sup> *Id.* at § III.

<sup>23</sup> *Id.*, Special Access Competition Data Analysis, Competition Tables & Table All-MSA-PEN-C (citing CLEC penetration in Honolulu, Hawaii, which is consistent with nationwide data).

<sup>24</sup> *Id.*

<sup>25</sup> *See* Section I, *supra*.

competition, reduce prices, and meet customer needs, additional Commission regulation is not only unnecessary, but also affirmatively harmful to customers. What is more, Time Warner has admitted that it originally incorrectly reported the nature of its ability to provide Metro Ethernet services, which are classified as business data services, indicating that “all of [its] headends throughout its entire service footprint were Metro-Ethernet-capable by 2013.”<sup>26</sup> Based on this admission, OTW’s headends in Hawaii have all been business data service-capable, since 2013, or 21 times the number of headends that Time Warner represented to be Metro Ethernet capable in the Rysman report.<sup>27</sup>

Hawaiian Telcom’s generally available special access rates, such as non-term DS-1 and DS-3 rates, have not increased for approximately 20 years. In fact, the volume levels needed to obtain a better rate have been lowered, benefitting many special access customers. Customers are opting more and more for IP-based services, and less and less for TDM-based services like DS-1 and DS-3. From 2011 to 2015, total TDM special access service revenues declined from [HIGHLY CONFIDENTIAL BEGINS] \*\*\*\*\* [HIGHLY CONFIDENTIAL ENDS], or declined by [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent, whereas Ethernet services increased from [HIGHLY CONFIDENTIAL BEGINS] \*\*\*\*\* [HIGHLY CONFIDENTIAL ENDS], or increased by [HIGHLY CONFIDENTIAL BEGINS] \*\*\* [HIGHLY CONFIDENTIAL ENDS] percent. Currently, only [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent of business data services revenues are from TDM services,

<sup>26</sup> Letter from Matthew A. Brill, Counsel for Time Warner Cable, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 12, 2016).

<sup>27</sup> CenturyLink, *et al.*, Motion to Strike, WC Docket No. 16-143, *et al.*, Declaration of Glenn Woroch and Robert Calzaretta, ¶ 8 (dated Jun. 17, 2016) (“CenturyLink Motion to Strike”).

which has dropped markedly from the [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent level in 2011. Combining both categories, Hawaiian Telcom’s annual revenue has declined over the same time period by [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent. Hawaiian Telcom projects that these trends will continue during 2016 and into the future.<sup>28</sup> These figures demonstrate customers are moving to newer Ethernet services. Competition for these services is evident from the increasing market share of cable TV and CLEC-provided Ethernet services. Thus, there is simply no analytical framework or evidence that would justify modifying Hawaiian Telcom (or mid-size carrier) business data service rates.

**III. MARKET DATA IN HAWAII DEMONSTRATES THAT THE COMMISSION SHOULD NOT MAKE A PRICING FLEXIBILITY SHOWING MORE BURDENSOME.**

Although the Rysman paper is fatally flawed for its reliance on outdated and flawed data,<sup>29</sup> even its conclusions are curious in their lack of support of the *BDS FNPRM* proposals. Rysman concludes that competition “consistently lowers prices in economically and statistically significant ways,”<sup>30</sup> yet nevertheless ignores evidence of actual and potential competition in making his conclusion.<sup>31</sup> The Rysman report, and the statistical analyses which underlies the

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<sup>28</sup> Hensarling Declaration at ¶ 4.

<sup>29</sup> CenturyLink Motion to Strike.

<sup>30</sup> *BDS FNPRM*, Appendix B, Marc Rysman, *Empirics of Business Data Services*, at 212. Although this statement is tethered to an analysis of where a building or census block is served by a competitor, Rysman admits that his “geographic market” statement is not based on a market analysis, but are only “narrative” statements based on CLEC assertions, *id.*, at 219, which are entirely self-serving.

<sup>31</sup> Hawaiian Telcom supports the motion to strike given that the significant new evidence that the amount of cable-provided Metro Ethernet services were erroneously downplayed, and due to the procedurally and substantively flawed scramble to revise the Rysman report after this new evidence was disclosed. Letter from CenturyLink, Inc., AT&T Inc., Frontier Communications,



BDS FNPRM proposals, do not support the conclusion that the business data services marketplace is noncompetitive.<sup>32</sup> This is true because a facilities-based carrier has facilities within one-half mile of the vast majority of large businesses, thus making it capable of competing with the current service provider in a building, including in Hawaii.<sup>33</sup> These facts should cause the Commission to proclaim victory, because its competition policies have been working. There is no justification for further regulation in these Phase I and II areas and, based on the data, additional deregulation is warranted for ILECs.

Hawaii has a unique insular geography where most of the population and businesses are concentrated on the island of Oahu, which is the target of most competitive entry. Given that competition is already a proven market fact, there is no further reason to require a new competitive showing in order for Hawaiian Telcom to have pricing flexibility authority on the island of Oahu. Thus, even if the Commission adopts some smaller geographic area as the appropriate geographic market for making a competitive showing, there is no reason to burden Hawaiian Telcom with unnecessary refiling obligations to justify pricing flexibility on Oahu.

Admittedly, there is less competition on some of the neighbor islands in Hawaii because populations there are scattered and smaller. Certainly there are far fewer businesses requiring business data services on the neighbor islands. Notwithstanding, because of the low-density populations and unique climate and terrain, providing business data services on these neighbor

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Corp., FairPoint Communications, Inc., Consolidated Communications, Cincinnati Bell, Inc., WC Docket No. 16-143 (dated Jul. 19, 2016).

<sup>32</sup> M. Israel, D. Rubin Feld, G. Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test, Third White Paper, WC Docket No. 16-143, § II (dated Aug. 9, 2016) (“Israel, et. al., Third White Paper”).

<sup>33</sup> In fact, record evidence confirms that the actual distance that a potential competitor will build out to is much greater than estimated by Rysman. *See id.* at § V.

islands entails much higher costs of providing service compared to Oahu. These higher insular costs justify higher business data service rates. Today, to a large extent, the tariffing mechanism for special access services has led to uniform, study-area-wide pricing (HTI's study area is the entire State of Hawaii), which results in lower-cost urban areas subsidizing higher-cost rural areas of the neighbor islands. Therefore, driving down the regulated prices for business data service on the neighbor islands would entail a high risk that prices there would be forced below costs, and therefore unlawful. Maintaining Hawaii-wide pricing (particularly for IP-based services if benchmarking to tariffed rates is adopted in this proceeding), would place Hawaiian Telcom at a competitive disadvantage since competitors could cherry pick customers in low cost areas, as they already attempt to do today.

The fact that wireless carriers need telecommunications connections to support 5G does not change this conclusion. Although 5G services promise significant economic benefits, these services need to cover the costs they cause. Carriers must be fairly compensated for the investment they make to bring service to the needed locations. Indeed, 5G deployment in general would be harmed in Hawaii if the risk-taking carrier, usually the ILEC, is not adequately compensated for its investment risks.<sup>34</sup> What is more, on average, wireless backhaul contractual charges in Hawaii for Ethernet services are roughly [HIGHLY CONFIDENTIAL BEGINS], \*\* [HIGHLY CONFIDENTIAL ENDS] percent lower for intra-island circuits on Oahu and about [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent lower for inter-island circuits than equivalent tariffed TDM prices for a three-year term.<sup>35</sup>

Thus, wireless carriers have already exerted their market power to achieve low, competitive

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<sup>34</sup> See Comments of United States Telecom Ass'n, WC Docket No. 16-143, 23-28 (dated Jun. 28, 2016).

<sup>35</sup> Hensarling Declaration at ¶ 6.

wireless backhaul pricing. Requiring other business data services customers to subsidize 5G provider deployment through below-cost prices is economically unwise, distorts markets, and is unlawful.<sup>36</sup>

**IV. ELIMINATION OF PREVIOUSLY GRANTED FORBEARANCE UNDERMINES CUSTOMER BENEFITS AND EXPECTATIONS.**

Hawaiian Telcom customers enjoy substantial benefits from the flexibility it has been granted by rule and order to provide business data services. In its Phase I-authorized areas, Hawaiian Telcom is able to offer customers contract tariffs on one day's notice, and volume and term offerings that permit customers to obtain discounted pricing. In its Phase II area, it can offer even more flexible benefits. In addition, through use of forbearance authority to provide deregulated IP-based services, including Ethernet services, these customers doubly benefit from being able to freely negotiate rates, terms, and conditions.<sup>37</sup>

Eliminating pricing flexibility and forbearance grants, even in newly defined “noncompetitive areas” pursuant to this rulemaking, is likely to harm these existing and future customers. These customers are likely to face price increases because HTI's special access tariffed rates are generally higher than flexibly priced arrangements. Re-regulating all business data service prices to make them more uniform throughout a carrier's service area, whether thorough a tariff or otherwise, would be a stale artifact of monopoly-era communications regulation. That crippling re-regulation is likely to undermine competition because competitors

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<sup>36</sup> Of course, driving down price cap indices or benchmarking Ethernet services to tariffed special access prices does nothing to ensure compensatory pricing in high cost areas since price cap rates have been flexibly set by carriers through the price cap indexing rules, and thus the direct link between accounting costs and rates have been severed for over twenty-five years. *See, e.g., Access Charge Reform*, Sixth Report & Order, 15 FCC Rcd 12962, ¶ 17 (2000).

<sup>37</sup> Hawaiian Telcom has already demonstrated why revocations of “deemed granted” forbearance authority may not lawfully be completed based on this record. Comments of Hawaiian Telcom, Inc., WC Docket No. 16-143, 19-21 (filed Jun.28, 2016).

would know what Hawaiian Telcom is allowed to bid and Hawaiian Telcom would be prevented from meeting the lower prices of competitors.<sup>38</sup> This will also allow competitors to increase their prices to just below ILEC prices, which is neither favorable to customers nor representative of true market competition.

What is more, customers of business data services have a strong, long-term expectation that their contracts are legal, subject only to general contract law. It would be markedly anticustomer to reopen these contracts, possibly leading to price increases and other changes in negotiated terms and conditions. Such a possibility smacks of retroactive rulemaking that is disfavored in the law.<sup>39</sup> The Commission rightfully has been cautious about interfering with private contracts which could undermine investment-backed expectations of the carrier and customers alike.<sup>40</sup> In this proceeding, there has been no showing that invalidating existing contracts would not have such an investment-squelching impact.

## **V. CONCLUSION.**

This record simply does not support re-regulation of business data services, particularly in Hawaii with its unique insular geography, terrain, and climate. Customers are benefiting from competition in Hawaii, and from the deregulated prices that exist in that market. All customers, including 5G providers, should pay the cost of providing service to their locations in order to

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<sup>38</sup> The Commission has long recognized the potential competitive impact of tariffs. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report & Order, 11 FCC Rcd 20730, ¶¶ 52, *et seq.* (1996).

<sup>39</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216-25 (1988) (Justice Scalia concurring).

<sup>40</sup> *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *et. al*, 15 FCC Rcd 22983, ¶ 36 (2000).

promote investment risk-taking by the provider. The Commission should therefore abandon the proposals contained in the *BDS FNPRM*.

Respectfully submitted,

By: /s/ Gregory J. Vogt

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August 9, 2016

**APPENDIX A**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Business Data Services in an Internet	)	WC Docket No. 16-143
Protocol Environment	)	
	)	
Special Access for Price Cap Local	)	WC Docket No. 05-25
Exchange Carriers	)	

**DECLARATION OF KENNETH HENSARLING, JR.**

I, Kenneth Hensarling, Jr., hereby declare the following:

1. I am Director of Business Product Management at Hawaiian Telcom and manage a team of ten product and marketing managers covering business and wholesale products. I am submitting this Declaration in support of the Hawaiian Telcom’s Reply Comments filed in the above-captioned proceeding on July 26, 2016 (“Hawaiian Telcom Reply Comments”).
2. I have reviewed Hawaiian Telcom Reply Comments and declare that the facts alleged therein are accurate to the best of my information and belief.
3. Business customers that subscribe to business data services are located primarily on the island of Oahu, where over 67 percent of Hawaii business addresses are located.
4. Customers are opting more and more for IP-based services, and less and less for TDM-based services like DS-1 and DS-3. From 2011 to 2015, total TDM special

access service revenues declined from [HIGHLY CONFIDENTIAL BEGINS] \*\*\*\*  
\*\*\*\*\* [HIGHLY CONFIDENTIAL ENDS], or declined by [HIGHLY  
CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent,  
whereas Ethernet services increased from [HIGHLY CONFIDENTIAL BEGINS] \*\*  
\*\*\*\*\* [HIGHLY CONFIDENTIAL ENDS], or increased by [HIGHLY  
CONFIDENTIAL BEGINS] \*\*\* [HIGHLY CONFIDENTIAL ENDS] percent.  
Currently, only [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY  
CONFIDENTIAL ENDS] percent of business data services revenues are from TDM  
services, which has dropped markedly from the [HIGHLY CONFIDENTIAL  
BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent level in 2011. Combining  
both categories, Hawaiian Telecom’s annual revenue has declined over the same time  
period by [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL  
ENDS] percent. Currently, only [HIGHLY CONFIDENTIAL BEGINS] \*\*  
[HIGHLY CONFIDENTIAL ENDS] percent of business data services revenues are  
from TDM services, which has dropped markedly from the [HIGHLY  
CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS] percent level in  
2011. Hawaiian Telcom projects that these trends will continue during 2016 and into the  
future.

5. On average, wireless backhaul contractual charges in Hawaii for Ethernet  
services are roughly [HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY  
CONFIDENTIAL ENDS] percent lower for intra-island circuits on Oahu and about  
[HIGHLY CONFIDENTIAL BEGINS] \*\* [HIGHLY CONFIDENTIAL ENDS]

percent lower for inter-island circuits than equivalent tariffed TDM prices for a three year term.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Kenneth Hensarling, Jr.

Dated: August 9, 2016